Petition

NO. 81-848

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In the Supreme Court of the United States

OCTOBER TERM, 1981

PONCHARTRAIN STATE BANK,
Petitioner

versus

MARSH INVESTMENT CORPORATION, ET AL.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a third party defendant may remove an entire case under the provisions of 28 U.S.C. § 1441.
2. Whether, under the provisions of 28 U.S.C. § 1441, only claims joined by the original plaintiff may be removed.
3. Whether a claim for indemnity can be "separate and independent" pursuant to 28 U.S.C. § 1441 (c).

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MAY IT PLEASE THE COURT:

The petitioner, Pontchartrain State Bank, respectfully prays that a writ of

certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 6, 1981[1].

OPINION BELOW

The opinion of the Court of Appeals, reported at 652 F.2d 583, appears in the appendix hereto at p. A-1. The opinions of the District Court for the Eastern District of Louisiana, reported at 490 F.Supp. 1320 and at 494 F.Supp. 344, appear in the Appendix hereto at pp. A-3 and A-23, respec-

1. The respondents in this petition are Marsh Investment Corporation, Crump London Underwriters, Inc., (Henry Ralph Rokely Johnson, Excess Insurance Company, Pine Top Insurance Company, Bellefonte Insurance Company, Generali, Trident, Economic, Guardian Royal Exchange, Parcels, General Copehagen Re, Kuwait Insurance Company, and Yasuda U.K., Ltd.), Eunice K. Langford, Langford Land Company, William M. Justice, Jr., and Charles J. Oubre. Petitioner does not have any parent companies, subsidiaries, or affiliates.

tively.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 6, 1981. No petition for rehearing was filed, and this petition for certiorari was filed within 90 days of the foregoing date of entry of judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§ 1441 Actions Removable Generally.

The text of 28 U.S.C. § 1441 is set out in the Appendix attached hereto at p. A-2.

STATEMENT OF THE CASE

This case came to the Federal Court originally upon a petition for removal filed by respondent, Crump London Underwriters,

Inc. ("Crump") (the third party defendant below) purportedly pursuant to the provisions of 28 U.S.C. § 1441 (a) and (c) and 28 U.S.C. § 1332 (c), based on diversity of citizenship between petitioner and Crump. The facts leading up to removal are as follows:

The present case was filed in the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana, proceedings no. 213-740, on June 6, 1978, by respondent, Marsh Investment Corporation ("Marsh), a Louisiana Corporation, against John A, Langford ("Langford"), a Louisiana Citizen, and petitioner herein, Pontchartrain State Bank ("Pontchartrain"), also a Louisiana Corporation, to set aside two mortgages executed in favor of Pontchartrain by Langford as agent for Marsh, on property owned by Marsh and located in the Parishes of Jefferson and St. Charles, State of Louisiana, to secure Langford's prior-existing indebtedness to Pont-

chartrain in the amount of $1,377,752.93.

Pontchartrain alleged that the mortgages in its favor were valid and, alternatively, that Langford and his mother, Eunice K. Langford (also indebted to petitioner at one time, but released by petitioner when Langford furnished the mortgages at issue), should be required to provide Pontchartrain with mortgages on property with an equal value in the event that the mortgages were declared invalid. However, in January, 1980, Langford filed a petition for voluntary bankruptcy, and all proceedings against him were stayed.[2]

Thereafter, in May, 1979, Pontchartrain brought a third party action for indemnity against its insurer, Crump, a Tennessee

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2. United States Bankruptcy Court for the Eastern District of Louisiana, proceedings no. 80-00015. The stay of these proceedings was obtained on March 4, 1980.

Corporation, and its associated companies,[3] on the basis of the Bonder's blanket bond it issued to petitioner, alleging that if the mortgages were declared invalid, Pontchartrain should recover under its bond.[4] On June 5, 1979, Crump timely filed a motion to remove the entire case to the United States District Court for the Eastern District of Louisiana under the provisions of 28 U.S.C. § 1441(a) and (c) and 28 U.S.C. § 1332, based upon diversity of citizenship between it and Pontchartrain.

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3. These associated companies will be found listed in n. 1.

4. The bond in question provided for: "Loss . . . through the insured's having in good faith and in the course of business, whether for its own account or for the account of others, . . . either gratuitously or otherwise acquired, accepted or received, or sold or delivered, or given any value, extended any credit or assumed any liability, on the faith of, or otherwise acted upon, any securities, documents or other written instruments which prove to have been counterfeited or forged. . ."

Marsh filed a Motion for Summary Judgment which was sustained as to all defendants except Langford (due to the stay issued by the Bankruptcy Court) on March 4, 1980. The District Court reconsidered its judgment on March 17, 1980, in view of Langford's deposition testimony, obtained after March 4, 1980, which testimony Pontchartrain had previously been unable to obtain despite repeated attempts. The District Court entered its memorandum opinion on June 3, 1980 (Appendix A-3), which essentially reaffirmed its previous judgment of March 4, 1980. The Court then, despite petitioner's opposition, certified its judgment pursuant to the provisions of Federal Rules of Civil Procedure Rule 54(b), and directed entry of final judmgent on July 3, 1980.[5]

5. The propriety of the granting of summary judgment and the certification of same were also appealed by petitioner to the Fifth Circuit, but are not raised as issues before this Court justifying the grant of certiorari.

On July 11, 1980, Pontchartrain filed a Motion to Amend, Alter, or Set Aside the Judgment of the District Court, alleging, for the first time, that the case was improperly removed to the federal district court and that the district court therefore had no jurisdiction over the subject matter of the action. This motion was denied by the District Court on July 30, 1980 (Appendix A-23), and Pontchartrain perfected an appeal to the United States Court of Appeals for the Fifth Circuit.

The United States Court of Appeals for the Fifth Circuit entered a judgment affirming the judgment of the District Court on August 6, 1981 (Appendix A-37).

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF NUMEROUS OTHER DISTRICT COURTS

AS TO THE PROPER INTERPRETATION OF 28 U.S.C. § 1441; IS IN CONFLICT, IN PRINCIPLE, WITH PRIOR DECISIONS OF THIS COURT; AND FURTHER PRESENTS SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE REMOVAL JURISDICTION OF THE FEDERAL COURTS.

Preliminarily, and as implied in the above heading, petitioner is fully cognizant of the fact that the decision of the Fifth Circuit sought to be reviewed is not in conflict with a decision of another Court of Appeals, since the Fifth Circuit is the only Court of Appeals to rule on the questions presented. However, the paucity of Appellate Court opinions is explained in great part by the provisions of 28 U.S.C. § 1447(d), which provide as follows:

> "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to sec-

> tion 1443 of this title shall be reviewable by appeal or otherwise."

Thus, with the exception of certain civil rights cases removed pursuant to the provisions of 28 U.S.C. § 1443, no defendant who has his case remanded has the right or opportunity to have the order of remand reviewed by the appellate court.[6] Consequently, the provisions of 28 U.S.C. § 1447(d) have fostered the growth of a very heterogeneous crop of district court decisions under 28 U.S.C. § 1441, while at the same time have prevented this harvest from ripening into appellate court decisions, whether uniform or otherwise. For this reason it is respectfully submitted that the

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6. As one court has recently stated, "[l]imited direction has been provided by appellate courts simply because orders of remand are not reviewable on appeal or otherwise. 28 U.S.C. Section 1447(d). "Hopkins Erecting Co. v. Briarwood Apartments of Lexington, 517 F.Supp. 243, 247 (E.D. Ky. 1981).

questions presented today, 33 years after the enactment of 28 U.S.C. § 1441, have obtained the maximum maturity permitted by statute, and are ripe for decision by this Honorable Court.

Both of the leading commentators on federal procedure, Professors Wright and Moore, based on an analysis of the language of Section 1441, would deny third-party defendants the right to remove based on the third party claim. First, in answer to the first question presented today, they interpret the use of the term "defendant" in Section 1441(a) to exclude third party defendants. 1 A Moore's Federal Practice ¶ 0.167[10] (2d ed. 1979); 14 Wright, Miller, and Cooper, Federal Practice and Procedure §§ 3724 and 3731 (1976). Second, they both agree that Section 1441(c) is limited to claims joined by the original plaintiff. 14 Wright, Miller, and Cooper, Supra, § 3724; 1

A Moore's Federal Practice, Supra, ¶ 0.167[10] at p. 420. And, as noted by these commentators, the majority of cases which have considered the problem of third party removal have concluded that a third party defendant is not entitled to remove the case. See 1 A Moore, Supra, ¶ 0.167[10]; 14 Wright, Miller, and Cooper, supra, § 3724.

It was with reason that one court, which was confronted with the problem, noted that "it is not an exaggeration to say at least on the surface the field luxuriates in a riotous uncertainty". Harper v. Sonnabend, 182 F.Supp. 594, 595 (S.D.N.Y. 1960).[7] The "riotous uncertainty" referred to occurs in part not only because there are cases which

7. Even very recently one court stated that "[t]he law of removal jurisdiction currently stands in an indefinite condition marked by uncertainty and inconsistency." Hopkins Erecting Co. v. Briarwood Apartments of Lexington, cited Supra at n. 4, 517 F.Supp. at 247.

deny, and cases which grant, removal by a third party defendant, but also because amongst the many cases denying removal, various, and often incongrous, reasons are assigned for the denial.

One line of cases denying removal reasons that either the third party defendant is not a "defendant" within the meaning of Section 1441(a), or that removal under Section 1441(c) is confined to claims joined by the plaintiff. Exemplary of this line of cases is Croy v. Buckeye International, Inc., 483 F.Supp. 402 (D.Md. 1979), Greater New York Mutual Insurance Co. v. Anchor Construction Co., 326 F.Supp. 245 (E.D. Pa. 1971), and Burlingham, Underwood, Baron, Wright & White v. Luckenbach Steamship Co., 208 F.Supp. 544 (S.D.N.Y. 1962). In the Croy case, the fourth party defendant sought to remove under the authority of Section 1441(a) and 28 U.S.C. § 1332, alleging diversity of citizenship between the original plaintiff

and defendant. There was no diversity between fourth party defendant and the third party defendant which impleaded it. In remanding the case to the state court, the district court held that since Section 1441(a) did not utilize the words "third party defendant", the extension of the right of removal to such defendants "would be an unwarranted act of judicial legislation". Croy v. Buckeye International, Inc., supra, 483 F.Supp. at 405, (quoting White v. Baltic Conveyor Co., 209 F.Supp. 716, 719 (D.N.J. 1962)).

In the Greater New York case, the removing third party defendant argued, in opposition to a motion to remand, that it stood in no different position than a defendant originally joined by the plaintiff. The district court replied that, even though the argument was appealing, it did "not overcome the policy considerations which militate

against judicial expansion of removal jurisdiction." Greater New York Mutual Insurance Co. v. Anchor Construction Co., supra, 326 F.Supp. at 248. The court further found that Section 1441(c) was limited to claims joined by the plaintiff.

The court in Burlingham, Underwood, Baron, Wright & White v. Luckenbach Steamship Co., supra, 208 F.Supp. at 546-47, reached the same result with the following analysis:

> "On the one hand, if jurisdiction exists in an action instituted originally in a federal district court, the court has jurisdiction over a third-party claim even though the third-party claim is not otherwise within federal jurisdiction . . . Correlatively, lack of federal jurisdiction over the main claim is not supplied by the introduction of a third-party claim as to which federal jurisdiction would exist if asserted in an independent action. . . Thus, a third-party claim can neither confer nor deprive a federal court of jurisdiction.
>
> * * * *
>
> "Removal on such a basis is too much

> akin to the tail wagging the dog . . . This is particularly true where, as here, the main claim is not otherwise within federal jurisdiction."
>
> (Citations ommitted)

Another line of cases denies removal on the ground that the third party claim fails to meet the "separate and independent" test set out in Section 1441(c).[8]

In Holloway v. Gamble-Skogmo, Inc., 274 F.Supp. 321 (N.D. Ill. 1967), an Illinois plaintiff sued a Minnesota corporation in an Illinois court for personal injuries. The plaintiff later joined an Illinois resident as a defendant, and the defendant filed a third party complaint against a New Jersey

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8. Professor Wright is apparently of the opinion that a claim for indemnification can never be separate and independent: "In one of the most common situations -- a third-party claim or cross claim for indemnification -- it is apparent that a separate and independent claim or cause of action is not presented." 14 Wright, Miller, and Cooper, supra, § 3724 at p. 645.

corporation for indemnification, which corporation removed the case to the federal district court. In remanding the case, that court stated:

> "In the case at bar, it is apparent that the third party complaint is completely dependent upon the main action. Defendant Gamble-Skogmo makes no claim against Uniroyal [third-party defendant] other than for indemnification for sums adjudged against it and in favor of plaintiff. Unless and until a judgment is entered for plaintiff, Gamble-Skogmo can recover nothing from Uniroyal. Where there is but one actionable wrong contained in a complaint, although separable controversies may ensue as a consequence thereof, no right of removal exists. American Fire & Casualty Co. v. Finn, 341 U.S. 6, 71 S.Ct. 543 (1951)."

Id. at 322.

In Harper v. Sonnabend, supra, the defendant was sued by the plaintiff for broker's commissions allegedly due, and the defendant impleaded a third party defendant claiming, that by reason of an agreement

between them, the third party defendant would be liable to the original defendant for any sums adjudged to plaintiff. The third party defendant removed the case to the federal district court, and the plaintiff moved to remand. In granting plaintiff's motion, the court held:

> "We have come to this determination by finding that the third-party suit is not separate and independent as required. In fact it does not state a claim, except in futuro. In the nature of things it might be completely non-existent."
>
> Id. 182 F.Supp. at 595 (emphasis by the court).

As noted previously, the majority of cases have held that a third party defendant does not have the right to remove a case, and the following cases, in addition to those cited, have so held:

Sequoyah Feed & Supply Company v. Robinson, 101 F.Supp. 680 (W.D. Ark. 1951); Shaver v. Arkansas-Best Freight System, Inc.,

171 F.Supp. 754 (W.D.Ark. 1959); Fiblenski v. Hirschback Motor Lines, Inc., 304 F.Supp. 283 (E.D.Ark. 1969); Sexton v. Allday, 221 F.Supp. 169 (E.D.Ark. 1963); Dowell Division of Dow Chemical Co. v. Ormsby, 204 F.Supp. 38 (E.D.Ky. 1962); White v. Baltac Conveyor Company, 209 F.Supp. 716 (D.N.J. 1962); Brumfield v. Stuck, 298 F.Supp. 380 (W.D.Okla. 1969); Cannon v. Goodyear Tire & Rubber Co., 241 F.Supp. 23 (E.D.S.C. 1965) (§ 1441(c) not applicable where claim is introduced into action by means of cross claim); Avco Aurora Industrial Bank v. Cline, 459 F.Supp. 857 (D.Col. 1978).

The decision below, review of which is here sought, alligns itself with the minority line of decisions which holds that a third party defendant has a right of removal pursuant to Section 1441, and squarely presents the classic factual situation: the third

party defendant (respondent, Crump), against whom was asserted only a claim for indemnity, removed the entire case to federal court, based on diversity of citizenship between it and the original defendant (petitioner, Pontchartrain). The original claim could not have been brought originally in the federal district court, neither at the time of removal nor at the time of judgment, since there was never any basis for federal jurisdiction. The Fifth Circuit's opinion concerning the questions presented for review today is primarily based upon its recent decision in Carl Heck Engineers, Inc. v. LaFourche Parish Police Jury, 622 F.2d 133 (5th Cir. 1980). There, a situation very similar in principle to that of the present case was presented: the plaintiff, a Louisiana corporation, sued defendant, a Louisiana public entity, for liquidated damages allegedly due under a Louisiana

contract. The defendant then filed a third-party claim for indemnity against a non-resident insurer. The third-party defendant removed the entire case under Section 1441(c) and 28 U.S.C. § 1332, based upon diversity of citizenship between it and the third-party plaintiff. The third party defendant then moved to sever the third-party claim from the original claim and to remand the original claim, which motions were granted. The third-party plaintiff moved to remand the entire case, which motion was denied. In affirming the judgments of the district court, the Fifth Circuit briefly quoted the conflicting district court decisions concerning removal by third-party defendants. After citing some of the cases which allowed removal it held as follows:

> "This is to us the more rational view. If the removal statute is to be applied uniformly, 'construction should not depend on the procedures of a particular state

> respecting third party practice'. Industrial Lithographic Co. [v. Mendelsohn, 19 F.Supp. 284, 286 (D.N.J. 1954)]. Furthermore, the language of the statute does not require only those causes of action joined by the original plaintiff to form the basis of removal.
>
> ". . . [Claims for indemnity] can be and often are brought in a separate suit from that filed by the original plaintiff in the main claim. If filed in the original suit, therefore, a claim essentially seeking indemnity should be considered separate and independent."
>
> Id. at 135-36.

Exemplary of other district courts which have allowed removal by third party defendants, reciting similar reasoning to that found in Carl Heck Engineers, Inc., supra, are: Ted Lokey Real Estate Co. v. Gentry, 336 F.Supp. 741 (N.D. Tex. 1972); Wayrynen Funeral Home, Inc. v. J. G. Link & Co., 279 F.Supp. 803 (D.Mont. 1968); and Coleman v. A & D Machinery Co., 298 F.Supp. 234 (E.D. Cal. 1969).

The reasoning found in Carl Heck Engineers, Inc., supra, and Industrial Lithographic Co., supra, cited therein, based on uniformity of application of the removal statutes, and that as such the construction of the statutes "should not depend on the procedures of a particular state respecting third party practice," derives from this Court's opinion in Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 104 (1941), wherein this Court stated:

> "The removal statute which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. Hence the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts."[9]

9. The directive of uniform application of the removal statutes was reiterated by this Court in Grubbs v. General Electric Credit Corporation, 405 U.S. 699, 705 (1972).

See Industrial Lithographic Co., supra, 199 F.Supp. at 286. However, cases which have held against removal by third party defendants have also relied upon Shamrock Oil & Gas Corp. for authority. See, eg., Croy v. Buckeye International, Inc., supra, 483 F.Supp. at 405, and Burlingham, Underwood, Baron, Wright & White v. Luckenbach Steamship Co., supra, 208 F.Supp. at 547, wherein the court stated:

> "This construction, allowing removal only by a plaintiff's defendant, is in full keeping with the directive of the Supreme Court in Shamrock Oil & Gas Corp. v. Sheets . . ."

In the Shamrock Oil & Gas Corp. case, this Court reviewed the legislative history of the removal statute (then 28 U.S.C. § 71) up to the time of its decision in passing upon whether a plaintiff-defendant in counter-claim could remove a case to federal court based upon the counter-claim. In affirming the judgment of the Fifth Circuit,

which held that a plaintiff-defendant in counter-claim was not a "defendant", this Court held as follows:

> "Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be resitricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'"
>
> Shamrock Oil & Gas Corp., supra, 313 U.S. at 108-09 (citations ommitted).

Read as a whole, it should be noted that Shamrock Oil & Gas Corp., while directing that the removal statute "was intended to be uniform in its application, unaffected by

local law definition . . .", also called for strict construction of the statute and consequently that the federal courts "scrupulously confine their own jurisdiction to the precise limits which the statute has defined." The case thus found against removal by a plaintiff who was characterized as a "defendant" under the local state practice. Ironically, however, the Fifth Circuit, in the decision below, as well as those other courts which have allowed removal by third party defendants under Section 1441(a) and have found indemnity claims to be "separate and independent", have cited Shamrock Oil & Gas Corp. as authority for allowing removal, albeit this Court, subsequent to Shamrock, reaffirmed that the removal statutes are to be strictly construed in American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1950).

Finn again found against removal under

the present statute (28 U.S.C. § 1441), upon finding that the removed claim could not meet the "separate and independent" test established therein under the provisions of Section 1441(c). In commenting upon the "separate and independent" requirement which had been added in the revision of the prior statute (28 U.S.C. § 71), this Court stated that "[t]he Congress, in the revision, carried out its purpose to abridge the right of removal," Id., 347 U.S. at 10, and in conclusion held as follows:

> "The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties. To permit a federal trial court to enter a judgment in a case removed without right from a state court where the federal court could not have original jurisdiction of the suit even in the posture it had at the time of judgment, would by the act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them."
>
> Id., 341 U.S. at 17-18 (footnote omitted).

The Fifth Circuit decision below is thus, in principle, in conflict with the decisions of this Court in the Shamrock Oil & Gas Corp. and Finn cases: Where this Court has called for strict construction of the removal statute against removal, the Fifth Circuit has expanded the removal statute by judicial interpretation by not only allowing removal by a third party defendant, but by also finding a claim for nothing more than indemnity, the substance of which, by definition, depends entirely upon the outcome of another prior claim (the original and main claim), to be separate and independent. Further, as presented hereinabove, the decision below is in conflict with the majority of cases which have ruled on the questions presented.

Finally, the decision below raises significant and recurring problems concerning the removal jurisdiction of the federal

courts inasmuch as the lower court decisions are so inconsistent in theory, as well as in practice, that the intent and meaning of 28 U.S.C. § 1441 is left in a state of confusion and disarray, contrary to the directive of uniform application expressed by this Court in Shamrock Oil & Gas Corp., supra, and Grubbs v. General Electric Credit Corporation, supra, at n. 9.

These conflicts, both actual and in principle, as well as the great amount of judicial confusion surrounding the proper interpretation of 28 U.S.C. § 1441, justify and, it is respectfully submitted, mandate the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and

opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

PONTCHARTRAIN STATE BANK,

Petitioner

versus

MARSH INVESTMENT CORPORATION, ET AL,

Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this 4TH day of NOVEMBER, 1981, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Robert M. Steeg, Esq., 1440 Oil & Gas Building, New Orleans,

Louisiana 70112, Counsel for Respondent, Marsh Investment Corporation; Alfred J. Morgan, Jr., Esq., 14 Wall Street, New York, New York 10005, and Marian Mayer Berkett, Esq. and Matt J. Farley, Esq., 4700 One Shell Square, New Orleans, Louisiana 70139, Counsel for Respondent, Crump London Underwriters, Inc.; Don M. Richard, Esq., 2100 Pan American Life Center, 601 Poydras Street, New Orleans, Louisiana 70130, Counsel for Respondent, Eunice K. Langford; Langford Land Company, 3870 Metairie Court, Metairie, Louisiana; Hon. William M. Justice, Ex-Officio Recorder of Mortgages, Parish of Jefferson, New Courthouse, Gretna, Louisiana 70053; and Hon. Charles J. Oubre, Ex-Officio Recorder of Mortgages, Parish of St. Charles, Hahnville, Louisiana 70057.

I further certify that all parties required to be served have been served.

Robert C. Lowe

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

NO. 80-3608

MARSH INVESTMENT CORPORATION,
Plaintiff-Appellee,

versus

WILLIAM M. JUSTICE, Clerk of Court, Etc., et al.,
Defendants-Appellees.

Aug. 6, 1981.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before CHARLES CLARK, TATE and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

The summary judgment in favor of the Marsh Investment Corporation is AFFIRMED on the basis of the district court's memorandum opinion, 490 F.Supp. 1320, entered June 3, 1980, United States District Court, Eastern District of Louisiana, Civil Action No. 79-2020, Section "E".

The district court correctly concluded that the Pontchartrain State Bank's third-party demand against the underwriters was a "separate and independent" cause of

action that was joined with non-removable actions, so that the entire case filed in state court was properly removed to federal court. 28 U.S.C. § 1441(c); *Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury*, 622 F.2d 133 (5th Cir. 1980). We are of the further opinion that the district court did not abuse its discretion in not remanding the non-removal actions at the time remand was requested, for the reasons more fully stated in the district court's opinion of July 30, 1980. See *Marsh Investment Corporation v. Langford*, 494 F.Supp. 344 (E.D.La.1980).[1] Nor can we find any abuse of discretion in the district court's grant of Rule 54(b) certification in the entry of the summary judgment. See *Curtis-Wright Corporation v. General Electric Company*, 446 U.S. 1, 9, 100 S.Ct. 1460, 1466-67, 64 L.Ed.2d 1 (1980).

Accordingly, we AFFIRM the district court judgment.

AFFIRMED.

CHARLES CLARK, Circuit Judge, specially concurring:

I concur in the panel's affirmance of the judgment of the district court and in all of the opinion except the second sentence of footnote 1. Since we are unanimous

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1. We do not pass upon the timeliness of the motion for remand, since we find no abuse of discretion in denying the motion, if timely. Although a majority of the panel further agree with the additional conclusion of the district court that the final judgment on the summary judgment claim entered pursuant to Rule 54(b) was a "final judgment" within the meaning of 28 U.S.C. 1447(c)—so that the motion to remand as improvidently ruled was not timely, not being "*before* final judgment"—it is unnecessary to pass upon this issue when, in any event, the refusal to remand was proper.

that it is unnecessary to pass upon the issue of whether this was a "final judgment" within the meaning of 22 U.S.C. § 1447(c), I do not.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIV. A. NO. 79-2020

MARSH INVESTMENT CORPORATION
Plaintiff

versus

JOHN A. LANGFORD, Pontchartrain State Bank, William M. Justice, Clerk of Court and Ex-Officio Recorder of Mortgages for the Parish of Jefferson, Charles J. Oubre, Clerk of Court and Ex-Officio Recorder of Mortgages for the Parish of St. Charles,
Defendants.

June 3, 1980.

CASSIBRY, District Judge:

MEMORANDUM OPINION

This matter was heard in chambers on March 17, 1980 on motion by defendant Pontchartrain State Bank to reconsider the court's decision on summary judgment of March 4, 1980, was argued by counsel for both sides, and was granted.

After due consideration,

IT IS ORDERED that the court's order of March 4, 1980 granting summary judgment will not be disturbed. The following reasons are entered to support the decision of March 4, 1980, as well as the order entered today.

REASONS

This court, as a preliminary matter, takes judicial notice that defendant John A. Langford has filed a petition in voluntary bankruptcy, pending as proceeding number 80—00015 in the United States Bankruptcy Court for the Eastern District of Louisiana. Pursuant to 11 U.S.C. Section 362, continuation of all proceedings against the bankrupt are automatically stayed. 11 U.S.C.A. § 362 (1979). Plaintiff has voluntarily withdrawn its motion for summary judgment as against John A. Langford, and it is accordingly dismissed without prejudice.

This suit was filed by Marsh Investment Corporation ("Marsh") against John A. Langford and Pontchartrain State Bank (the "Bank") to set aside two mortgages filed of record against certain property owned by plaintiff. The subject property is located in Jefferson and St. Charles Parishes, and the respective recorders of mortgages for the two parishes have been joined in the suit. The Mortgages were executed by Langford, purportedly acting as agent for Marsh, in favor of the Bank. Because summary judgment can appropriately be entered against the Bank and the recorders without participation by Langford, I originally denied the Bank's motion

to continue this motion until Langford could be deposed. However, because these reasons were to follow my decision on summary judgment entered March 4, 1980, I agreed to reconsider my decision and delay issuance of these reasons until I considered Langford's testimony. I adhere to my previous decision for the following reasons.

Most of the facts surrounding the transactions that led to the execution of the mortgages are uncontroverted. Langford was heavily indebted to the Bank, and several of his loans with the Bank were delinquent. Langford proposed that the Bank refinance his loans, apparently in connection with a proposed purchase of the Colonial Bank.[1] After some negotiations, Langford and the Bank agreed to refinance the loans and secure them by a collateral mortgage on property owned by the Marsh Investment Corporation.

Marsh is a Louisiana corporation, formed by Mr. Carlos Marcello for the purpose of investing in real estate. Most of the stock in the corporation is owned by the family and friends of Carlos Marcello. No person or entity owns a controlling percentage of Marsh's stock.[2] Langford was a friend of Carlos Marcello and frequented the offices of Marsh. The property that was to be subject to the mortgage is owned by Marsh and is located in Jefferson and St. Charles Parishes.

Two loans were in fact made to Langford to refinance his debts, one of $1,000,000.00 and one of $200,000.00.

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1. There is some question as to the participation of Langford's mother, Eunice K. Bristow, in the loan transactions. Her precise role in the transactions is not material to this decision.

2. Carlos Marcello personally owns 130,000 shares out of the 1,000,000 shares issued, or 13%.

To secure the loans, two collateral mortgages were placed on the Marsh property, one dated June 18, 1977 and one dated February 14, 1978. Before the deal was agreed upon, however, the Bank required that Langford meet the requirements of its attorneys.

The Bank's attorneys asked that Langford present them with a corporate resolution from Marsh and approval of its shareholders concerning the pending transactions. The attorneys also required that Langford submit an opinion from his attorneys as to the validity of the loans.

A corporate resolution purporting to authorize Langford to consummate the loan transactions as agent for Marsh was appended to each mortgage. Each resolution was certified by a James Perez as secretary of Marsh. In addition, unanimous consent of the shareholders of Marsh was apparently procured, and papers documenting the same deposited with Langford's attorneys. The first document was certified under the signature of James Perez to be a list of the stockholders of Marsh. Several names were lined through and what appear to be James Perez' initials placed in the margin next to them. A "consent of shareholder" form accompanies the list for each name not crossed off the list. James Perez signed the consents for two corporate shareholders as president of the corporations.

The Bank did not see the unanimous consents or the

shareholder list. They were deposited with Langford's attorneys, to be released only in the event of litigation. Langford's attorneys prepared an opinion describing the documents placed in escrow and sent the opinion to the Bank. The opinion is carefully worded and avoids attesting to the authenticity of any of the documents or giving an opinion as to the validity of the loan. It concludes:

> I have not reviewed or even seen any charter, by-laws, stock books or any other documents of this corporation, nor have I conducted any investigation of this corporation whatsoever, even as to its existence. I make no representation or warranty, or give any opinion, that these people are in fact shareholders of Marsh Investment Corporation, or, if they are that they are the same people who signed these consent forms.

The Bank aparently made no further investigation of Langford's authority to mortgage Marsh's property. The Bank completed the loan transactions, keeping the greater portion of the funds to extinguish the existing delinquent debts, and collateral mortgages were executed on Marsh's property.

Unfortunately, all of the documents purportedly authorizing Langford to act as agent for Marsh were forgeries. If James Perez exists at all, no one acknowledges that he is known to him. The president, vice-president, and secretary of Marsh have all submitted affidavits attesting that James Perez is not known to any of them, that he was never the secretary of Marsh Investment Corporation, and that he was never empowered to act on its behalf. The secretary of Marsh

attests that no resolution authorizing Langford to encumber any property owned by Marsh was ever approved by the corporation or its shareholders, and the purported list of stockholders of Marsh is a false and incorrect list.

Each of the shareholders whose "consent of shareholder" was attached to the false list has denied by affidavit that he signed the consent form. The presidents of the two corporate shareholders have denied that James Perez was ever the president of the respective corporations or that he was ever empowered to act on their behalf. Each of the true stockholders of Marsh, according to the list submitted with the affidavit of Marsh's secretary, has denied either by affidavit or by sworn written interrogatory that he or she has ever heard of James Perez or consented in any manner to authorize Langford or anyone else to encumber Marsh's property. Marsh, of course, received none of the proceeds of the loans.[3]

The Bank has not substantially controverted these facts. It has submitted only the testimony of Langford and his attorney, Mr. Stassi, attempting to raise an issue as to a material fact to avoid summary judgment. As I will discuss later, however, the Bank's contention fails to effectively dispute the critical factual questions and legal issues in the case, *i.e.*, whether the corporation did in fact authorize Langford to execute the mortgages, and whether the Bank discharged its duty to ascertain the authority behind Langford's agency. Because there

3. The Bank's opposition to Marsh's reply memorandum claims that insufficient evidence has been received to determine whether Marsh has received any proceeds of the loans. The Bank has submitted no affidavits in support of this position to counter those of Marsh's officers, all of whom attest that no benefits were received from Langford or the Bank.

is no genuine issue as to any material fact, and the facts show that plaintiff is entitled to judgment as a matter of law, I must grant plaintiff's motion for summary judgment. Fed.R.Civ.P. 56; *Stafford v. United States*, 611 F.2d 990 (5th Cir. 1980).

Louisiana law[4] is clear that any action taken in the name of a corporation that is unauthorized by the corporation cannot bind the corporation. *Margolis v. Allen Mortgage & Loan Corp.*, 268 So.2d 714 (La. 4th Cir. Ct.App.1972); *Stevens v. Booth Motor Co.*, 9 La.App. 535, 119 So. 725 (2d Cir. 1929). In *Margolis*, for example, the secretary-treasurer of a corporation executed an act of notarial assignment and transfer of a mortgage note owned by the corporation to plaintiff. Plaintiff attempted to foreclose on the mortgage note. The court held that the attempted assignment was of no legal effect, and thus could not be the basis of plaintiff's execution, because the secretary-treasurer had not been authorized to make the transfer by resolution of the corporation's board of directors. In *Stevens*, certain promissory notes ostensibly signed by the corporation's president on behalf of the corporation had in fact been signed by the president's wife, who had no authority to do so. The court held the notes illegal, null, and void, even in the hands of an innocent third party.

The affidavits and sworn answers to written interrogatories submitted by plaintiff establish beyond question that Marsh did not in fact authorize Langford, or anyone else, to mortgage its properties. No valid resolution of the corporation was passed, *see* La.Rev.Stat.Ann.

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4. This suit was removed from state court by a third party defendant on the ground of diversity of citizenship. *See* 28 U.S.C. §§ 1441, 1332 (1976). I must decide the case under principles of state law. *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

§ 12:81 (1969), and no valid unanimous consent of the shareholders was obtained, *see* La.Rev.Stat.Ann. § 12:76 (1969). Like *Margolis* and *Stevens*, although the resolutions, shareholder list, and consents were ostensibly signed by someone in the name of the corporation and its shareholders, they can be of no legal effect because no valid authority was actually conferred. Consequently, no valid authority was conferred on Langford to act in the name of the corporation, and his acts cannot have had legal effect. On this basis alone I could find that the execution of the mortgages was illegal, null, and void, even if the Bank had been an innocent third party.

But even further, Langford himself purported to act for the corporation, not as an officer, director, or controlling shareholder, but merely as an agent. Louisiana law specifically holds:

> [T]he person who deals with a corporation . . . is generally bound to know whether or not the person who presumes to represent the corporation and act in its name is authorized to do so. Our jurisprudence holds additionally that *the person dealing with an agent is put on his guard by the fact of the person's agency alone and deals with him at his own risk.* It is his duty to inquire into and ascertain the nature and extent of his powers as an agent and determine whether or not the act or contract about to be consummated comes within the province of his agency and will or will not bind his principal. [citations omitted].

Carey Hodges Associates v. Continental Fidelity Corp., 264 So.2d 734 (La. 1st Cir.Ct.App.1972) (emphasis added). *See Buckley v. Woodlawn Development Corp.*, 233

La. 662, 98 So.2d 92 (1957); *Graves v. Pelican Downs, Inc.*, 292 So.2d 297 (La. 1st Cir.Ct.App.1974).

In *Carey Hodges Associates v. Continental Fidelity Corp.*, 264 So.2d 734 (La. 1st Cir.Ct.App.1972), plaintiff brought suit to recover fees due for preparation of plans for a race track. The person signing on behalf of the corporation was in reality the promoter of the race track, not an agent or employee of the corporate owner of the track. He had negotiated for his own purposes; he did not have ultimate authority to enter into a contract for preparation of the plans on behalf of the corporation. The court held not only that the promoter did not have authority to bind the corporation, but that the plaintiff had not properly discharged its duty to inquire into the promoter's authority, and therefore was not justified in relying upon his signature.

In this case, the Bank apparently relied heavily on the purported resolutions given to it by Langford. In *Hibernia National Bank v. National Bank of Commerce*, 204 La. 777, 16 So.2d 352 (1943), the court specifically held the Hibernia Bank was negligent to rely on the facial validity of a resolution authorizing the president of Louisiana State University to borrow $100,000.00. The document, the *Hibernia* court found, had in fact been prepared by the president sometime after the meeting of the Board of Trustees of the University at which it was supposedly adopted. The court relieved the Hibernia Bank from responsibility for the president's embezzlement of the funds only because its negligence was superceded by the negligence of the Bank of Commerce, which negotiated the Hibernia Bank's check under the president's unauthorized endorsement on behalf of the University.

The Pontchartrain Bank in this case was no more justified in relying on the facial validity of resolutions authorizing a stranger to the corporation to act as agent in procuring loans than the Hibernia Bank was in relying on the bona fides of the president of the state's largest university. Even worse, the resolution in *Hibernia* at least authorized the president to procure the loan on behalf of the University, and the Hibernia Bank's check was made out to its order. The resolution in this case purported to allow Langford to mortgage the property of the corporation to secure his *personal* indebtedness. The Bank should have been all the more cautious when faced with the prospect of using corporate property to secure a personal debt, especially the personal debt of a stranger to the corporation. *Cf. Lilliedahl & Mitchel v. Avoyelles Trust & Savings Bank*, 352 So.2d 781 (La. 3d Cir. Ct.App.1977) (applying corporate funds to the personal debt of a corporate officer; Bank must "proceed cautiously . . . especially when large sums of money are involved").

Even the most cursory examination of Marsh's corporate records would have revealed that no James Perez was ever connected with the corporation, and that no resolution authorizing Langford to mortgage the property to secure a loan on his (Langford's) behalf was ever considered by the board. Furthermore, the Bank certainly was not justified in relying on the shareholder list and consents. In the first place, the Bank never insisted on an opportunity to examine the list and consents for itself. If the Bank had done so, the Bank could have easily compared them with Marsh's records to find that they were all false documents. Moreover, the Bank could not have justifiably relied on the opinion by Langford's counsel, Mr. Stassi, which was so qualified that it should have waved a sea of red flags indicating that additional

investigation was necessary. It did not even opine on the validity of the list or the consents, much less the loan transaction itself. Mr. Stassi testified at his deposition that he considered it the Bank's responsibility as lender to determine the validity of the resolution and the consents. Like *Carey Hodges* and *Hibernia*, the Bank did not properly discharge its duty to inquire into Langford's authority as agent, and therefore dealt with him at its risk. *See also Credit Alliance Corp. v. Centenary College*, 17 La.App. 368, 136 So. 130 (La. 2d Cir. Ct.App.1931).

The Bank has submitted the depositions of Langford and Stassi purporting to raise an issue of material fact. Langford testified that Carlos Marcello was aware that the mortgages were to be granted prior to their execution and gave him permission to grant the mortgages on the land owned by Marsh. Langford testified that he had several transactions that Marcello "helped" him with, for which he paid Marcello, including $20,000 around the time of the Marsh transactions. Langford testified that Phillip Smith, now deceased but then attorney for Marsh, furnished him (Langford) with the documents purportedly authorizing the mortgages. As far as Langford was concerned, Marcello owned the properties in question. The Bank also points to statements made by Marcello at his deposition that the board of directors and shareholders of Marsh usually followed his recommendations, including the decision to purchase the land involved in this case. Marcello admits his friendship with Langford but denies that he gave Langford permission to encumber the properties. The Bank contends issues are raised as to Langford's authority to mortgage the properties and as to Carlos Marcello's credibility.

On a motion for summary judgment, I must take all facts and inferences in the light most favorable to the opponent of the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). On the other hand, the factual issues raised cannot be irrelevant or spurious. *Bolack v. Underwood*, 340 F.2d 816 (10th Cir. 1965). The opponent of the motion must present a set of facts that supports a viable legal theory which would entitle it, if accepted, to judgment as a matter of law. *Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620 (9th Cir. 1977); *McGuire v. Columbia Broadcasting System, Inc.*, 399 F.2d 902 (9th Cir. 1968).

Even accepting Langford's statements as true, all they can prove is that Carlos Marcello and/or Phillip Smith perpetrated a conspiracy to defraud Marsh, and used Langford as his or their pawn. But the statements are not probative of the crucial issue in this proceeding, which is whether Marsh can be bound to the mortgages under the circumstances. To hold the corporation to these mortgages, I would have to find that Langford had either actual authority or apparent authority to execute them on behalf of the corporation. *See Lilliedahl & Mitchel v. Avoyelles Trust & Savings Bank*, 352 So.2d 781 (La. 3d Cir. Ct.App.1977).

As I have discussed earlier, it is clear that Langford did not have actual authority to act as agent for Marsh to mortgage its property. The resolutions could not grant *actual* authority because the resolutions were not *actually* authorized by the corporation.

Furthermore, even on the facts relied upon by the Bank, Langford could not possibly have been clothed with so-called apparent authority to bind the corporation. In Louisiana:

> Apparent authority is a doctrine created by the courts to protect persons dealing in good faith with *corporate officials* where *the corporation* has taken such action or inaction as to justify a belief that *the official* has acted with authority. The doctrine has two requirements: (1) *The principal* must make some form of manifestation to an innocent *third party;* and (2) The third party must rely reasonably on the purported authority of the agent as a result of the principal's manifestations. [citations omitted].

Lilliedahl & Mitchel v. Avoyelles Trust & Savings Bank, 352 So.2d 781, 787 (La. 3d Cir. Ct.App.1977) (emphasis added); *See Analab, Inc. v. Bank of the South,* 271 So.2d 73 (La. 4th Cir. Ct.App.1972). In *Lilliedahl & Mitchel v. Avoyelles Trust & Savings Bank,* 352 So.2d 781 (La. 3d Cir. Ct.App.1977), the president of a corporation acted beyond the general authority granted to him by a resolution of the corporation that allowed him to conduct certain of its business affairs. The court held that a bank could not bind the corporation to his actions because the bank's reliance on his purported authority was unreasonable.

By contrast, in *Analab, Inc. v. Bank of the South,* 271 So.2d 73 (La. 4th Cir. Ct.App. 1972), the bank allowed its president, Mr. Grandbouche, to conduct personal business activities on the bank's premises. Grandbouche requested that plaintiff analyze the gold and silver content of some native ore samples, which he provided to plaintiff's representative at his office in the bank. Grandbouche failed to inform the plaintiff that the services were to be performed for himself personally or for a third party.

The *Analab* court held that the bank contributed to the circumstances creating the apparent authority by allowing its president, a corporate officer, to conduct his personal activities actively and on a daily basis on the bank's premises. Plaintiff could reasonably have believed that the services were to be performed on behalf of the bank to provide technical information for use in processing a loan application. The court thus held the bank liable to the plaintiff because, through the bank's manifestations and the surrounding circumstances, it was reasonable for plaintiff to believe Grandbouche was acting within his apparent authority as president of the bank.

In this case, the corporation made no manifestation whatsoever to the Bank, *i.e.*, the third party. Langford was in no way connected to the corporation, as an official or otherwise, other than being a friend of Carlos Marcello. His friendship was surely not a manifestation on behalf of Marsh that he was authorized to act on the corporation's behalf. Whatever manifestations Marcello or Smith may have made to Langford as to his authority were apparently not made either by those individuals or by the corporation to the Bank, which is the critical link. (Langford pointedly testified that he merely *presumed* that Marcello had spoken with the Bank officials about the pending transactions because Marcello was friendly with them. The Bank president testified that he did not speak with Marcello about the transactions.) And the false resolutions cannot be used to bootstrap either Langford's "official" agency or a resolution on behalf of Marsh constituting a manifestation because the corporation had nothing to do with the resolutions.

The Bank argues that *Lilliedahl* and other cases cited

by plaintiff are inapposite because those cases involved actions by corporate officials beyond powers actually granted by corporate resolution. In this case, it argues, the resolution purported to grant exactly the power that was exercised. Thus Langford had the "apparent" authority that was authorized on the face of the resolutions.

But "apparently" having authority, in the colloquial sense, is just not the same thing as having legally recognized "apparent" or "inherent" authority. The principles established by *Lilliedahl* are still good law: it is the principal, *i.e.*, the corporation, that must make some manifestation that can reasonably be construed as giving the agent authority. This case is actually worse than *Lilliedahl*, where the person presuming to act in the corporation's name held out the manifestations of the corporations's presidency and its valid general resolution authorizing him to take some actions in the name of the corporation. The invalid resolution on Langford's behalf cannot bind the corporation, no matter what authority it purported to give Langford. *See D'Aubin v. Mauroner-Craddock, Inc.*, 262 La. 350, 263 So.2d 317 (1972); *Hibernia National Bank v. National Bank of Commerce*, 204 La. 777, 16 So.2d 352 (1943).

Even more, it is not even clear that the doctrine of apparent or inherent authority can apply in this case. The Louisiana civil code provides that the power must be express and special for an agent "[t]o incumber [sic] or hypothecate." La. Civ.Code Ann. art. 2997 (West 1952). So it seems that not even Carlos Marcello himself, or any officer of Marsh for that matter, could have validly ex-

ecuted these mortgages, because even though the corporation usually followed Marcello's recommendations, he was not expressly authorized by resolution to take such action in the name of the corporation. Mortgaging the property of a corporation to secure a debt

> is more than an administrative function. Such is not an inherent power of any corporate officer and may only be vested by corporate action either expressed in its charter or by its board of directors in regular proceedings. If this were not true, it is obvious a corporation would be at the mercy of its officers and agents and exposed to financial ruin at all times as a result of their bad judgment, dishonesty, or fraud.

Credit Alliance v. Centenary College, 17 La.App. 368, 136 So. 130 (2d Cir. 1931) (head bookkeeper/bursar executed promissory notes for corporation). *See Lilliedahl*, 352 So.2d 781 (applying corporate funds to the personal debt of a corporate officer).

The "dispute" as to the credibility of Carlos Marcello cannot create a dispute as to the corporation's actions. Defendant must do more than claim that it can discredit one of plaintiff's witnesses at trial. It must still come forward with evidence which, viewed most favorably to them, would permit an inference that they are entitled to judgment as a matter of law. *See Modern Home Institute, Inc. v. Hartford Accident and Indemnity Co.*, 513 F.2d 102, 110 (2d Cir. 1975). Again, even assuming Langford's testimony is the truth, all it shows is that Carlos Marcello and Phillip Smith were involved in a fraud. There is no dispute that Marsh is the true owner of the land; there is no dispute that the resolutions and

shareholder list and consents are false; and these are the material facts.

The Louisiana civil code provides that a "[c]onventional mortgage is acquired only by consent of the parties . . .." La.Civ.Code Ann. art. 3342 (West 1952). Similarly, the law provides that cancellation of mortgages can only be effected by consent of the parties empowered to do so. La.Civ.Code Ann. art. 3371 (West 1952). When a mortgage has been cancelled through error or fraud, the court will order it reinstated. *Davis-Wood Lumber Co. v. DeBrueys*, 200 So.2d 916 (La. 1st Cir. Ct.App.1967); *Gulf South Bank & Trust Co. v. Demarest*, 354 So.2d 695 (La. 4th Cir. Ct.App.1978). Because these mortgages were acquired either through error or through fraud, and not by consent of the corporation, they are illegal, null, and void, and must be extinguished.

The clerk will prepare a judgement consistent with this opinion.

MINUTE ENTRY
JUNE 25, 1980
CASSIBRY, J.

MARSH INVESTMENT CORPORATION

versus

JOHN A. LANGFORD, et al.,

CIVIL ACTION

NO. 79-2020

SECTION "E" (3)

ORDER

On March 4, 1980, this Court granted the motion by plaintiff Marsh Investment Corporation for summary judgment with respect to plaintiff's claims against defendants Pontchartrain State Bank, William M. Justice, Jr., Clerk of Court and Ex-Officio Recorder of Mortgages for the Parish of Jefferson, and Charles J. Oubre, Clerk of Court and Ex-Officio Recorder of Mortgages for the Parish of St. Charles. On June 3, 1980, I issued written reasons for my decision. Finding that there is no just reason for delay,

IT IS ORDERED that the clerk enter a final judgment in plaintiff's favor on its claims against these three defendants. Third party defendants' motion to stay the

third party demand is granted. All further proceedings in this matter will be stayed until final resolution of the main demand. I will withhold ruling on plaintiff's motion for a protective order; defendant Pontchartrain State Bank may notice the deposition of Mr. Carlos Marcello.

REASONS

I have given this case serious consideration throughout. In the interest of sound judicial administration, I am ordering that final judgment be entered under the provisions of Rule 54 (b) of the Federal Rules of Civil Procedure. Accordingly, I will also stay trial of the third party demand.

My decision on summary judgment in favor of plaintiff resolved all of plaintiff's claims against the three affected defendants and decided in plaintiff's favor its essential claim for relief, i.e., the cancellation of two mortgages in favor of defendant. Pontchartrain State Bank currently inscribed in the records maintained by the two other defendants. Because of the great value of the land involved and the historic deference given to avoiding clouds on legal title to land, it is fair to the litigants to enter final judgment as soon as possible. Certification at this time will not result in unnecessary appellate review; rather, it attempts to avoid it. If my decision on summary judgment is upheld, it will shape the conduct of the trial on the third party demand. On the other hand, if I am reversed, many of the same issues that will be tried as part of the third party demand can be heard at the same time as the main demand.

Review of these adjudicated claims will not be mooted by future developments in this case; there will be none

that I can perceive at this time. Since trial of the third party demand will only be necessary if the mortgages are declared to be invalid, once the appellate court decides this issue on the evidence presented, it should not have to decide it again even if there are subsequent appeals. *See* Curtiss-Wright Corp. v. General Electric Co., 100 S.Ct. 1460 (1980). Thus, allowing final judgment to be entered should have the result of preventing needless litigation and avoids piecemeal appeals. For all of these reasons, there is no just reason to delay the entry of final judgment on plaintiff's claims against these three defendants.

For the same reasons, trial of the third party demands will be stayed until the main demand is finally resolved. Defendant Pontchartrain State Bank apparently intends to notice the depositions of Mr. Carlos Marcello and Marsh, and plaintiff asks that the depositions be stayed pending appeal. I will not issue a protective order at this time. Although my ruling today indicates that I will not reconsider once again my decision on summary judgment, the Bank may depose Mr. Marcello and Marsh pending appeal, after conforming with any other applicable provisions of the Federal Rules.

FRED J. CASSIBRY

UNITED STATES DISTRICT JUDGE

Order entered June 26, 1980

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIV. A. NO. 79-2020

MARSH INVESTMENT CORPORATION
Plaintiff

versus

JOHN A. LANGFORD, Pontchartrain State Bank, William M. Justice, Clerk of Court and Ex-Officio Recorder of Mortgages for the Parish of St. Charles, Crump London Underwriters, Inc., John A. Langford, Langford Land Company, Eunice K. Langford,
Defendants.

July 30, 1980

MEMORANDUM OPINION

CASSIBRY, District Judge:

This matter was heard in chambers on July 18, 1980 on motion by Pontchartrain State Bank to alter, set aside, or amend judgment and was denied. The following reasons are assigned in support of my disposition:

The primary controversy involved Marsh Investment Corporation and Pontchartrain State Bank, both Louisiana corporations. Marsh brought suit in state court against the Bank to cancel two mortgages placed on its land in favor of the Bank on the grounds that the mortgages were fraudulently obtained. The Bank filed a third party action against its underwriter for indemnity. The Bank's claim was that if the mortgages were cancelled (rendering the underlying debt uncollectible as a practical matter), the insurance companies would have to pay off under their policies. The underwriter removed to federal court on the ground of diversity of citizenship in the third party demand.[1] *See* 28 U.S.C. §§ 1332(a)(1), 1441 (1976).

After extensive discovery, plaintiff brought a motion for summary judgment on the main demand, which I granted. I then certified the claim for final judgment under Rule 54(b). Fed.R.Civ.P. 54(b). The clerk entered final judgment on July 3, 1980. The Bank now asks me to vacate my judgment, arguing the court did not have subject matter jurisdiction over the case, and asserts that the case should be remanded to state court. *See* Fed.R.Civ.P. 59(e); 28 U.S.C. § 1447(c) (1976).

1. Is the motion timely?

The remand statute provides that the district court shall remand if it finds "at any time *before final judg-*

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1. The original named third party defendant was Crump London Underwriters, Inc., a Tennessee Corporation. Later, the third party complaint was amended by stipulation to substitute the individual insurance companies, several British entities. The amendment did not destroy diversity or otherwise change the propriety of removal. *See* 28 U.S.C. §§ 1332(a)(2), 1441 (1976); *Twentieth Century-Fox Film Corp. v. Taylor*, 239 F.Supp. 913, 914 (S.D.N.Y.1965).

ment" that the case was improvidently removed or the court lacks jurisdiction. 28 U.S.C. § 1447(c) (1976) (emphasis added). Third party defendants argue that because final judgment was entered, it is now not within my power to remand to state court—the Bank must present its motion to remand in the court of appeals.

Although this position is technical, it is not without support. In a recent case, Justice Rehnquist said:

> [W]here after removal a case is tried on the merits without objection and the federal court enters judgment, the issue *in subsequent proceedings on appeal* is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court.

Grubbs v. General Electric Credit Corp., 405 U.S. 699, 702, 92 S.Ct. 1344, 1347, 31 L.Ed.2d 612 (1972). The quoted phrase is certainly not dispositive because it was not the major import of what the Justice was discussing. Nevertheless, the meaning on the face of the statute is that final judgment deprives the district court of remand power.

On the other hand, the Fifth Circuit decision in *Live and Let Live, Inc. v. Carlsberg Mobile Home Properties, Ltd.*, 592 F.2d 846 (5th Cir. 1979) clouds the issue. In that case, a Florida plaintiff brought an action for breach of contract in a Florida state court. The California defendant removed to federal court on the ground of diversity. Just before trial, defendant, a partnership, sought remand on the ground that it had acquired local residents as partners, thus destroying diversity. The motion was

denied. The case was tried to a jury that returned a verdict for plaintiff. Defendant then renewed its motion to remand. The court entered judgment on the jury's verdict but stayed execution of the judgment pending resolution of the motion.

The district court later concluded that diversity was destroyed, vacated its judgment, and remanded. The court of appeals affirmed. Among other things, it held that final judgment had not been entered within the meaning of section 1447(c) because the district court's judgment on the jury's verdict was expressly conditional on the outcome of the remand motion. The appellate court stated, "The finality of a judgment must be determined from the circumstances under which it was entered." 592 F.2d at 848.

In this case, I ordered that final judgment be entered pursuant to Rule 54(b). Nevertheless, the Federal Rules allow a party to ask me to alter or amend the judgment within 10 days of its entry, Fed. R.Civ.P. 59(e), and the Bank did bring this motion in that time. It can be argued that even a final judgment is not "final" within the meaning of section 1447(c) until after the 10 day period.[2]

I believe that considering the circumstances under which this judgment was entered, as *Live and Let Live* compels, it was final within the meaning of section 1447(c). I ordered final judgment to be entered without condition, and, unlike *Live and Let Live*, a signed judgment was entered into the record by the clerk. *See*

2. By way of contrast, Rule 60 also allows relief from a "final" judgment, but Rule 60(b) expressly provides that "A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation." Fed.R.Civ.P. 60(b).

Fed.R.Civ.P. 58, 79(a) (judgment effective when the clerk enters it in the civil docket). For all intents and purposes, I was waiting only for a notice of appeal on behalf of the Bank. The language of section 1447(c) would be virtually meaningless unless *Live and Let Live* is fairly narrowly limited to its facts. The Bank's motion to vacate, alter, or amend—in effect a motion to remand for lack of subject matter jurisdiction—is too late to be presented in the district court. On the other hand, I will reach the merits of the jurisdiction question to avoid needless delay if the court of appeals disagrees with my conclusion.

2. Was the case properly removed?

This question has generated controversy out of proportion to its narrowness. The removal statute provides:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

28 U.S.C. § 1441(c) (1976). This case does not present the usual section 1441(c) problem; in most cases the plaintiff joins several different claims or causes of action, some of which may be removable by defendant and some not removable. Here the question is the removability of a third party demand by the third party defendant.

Professor Moore's position is that no counterclaim, cross-claim, or third party claim should be removable.

1A Moore's Federal Practice ¶ 0.157[7], at 115 n.8 and ¶ 0.167[10] (2d ed. 1979). Professors Wright, Miller, and Cooper apparently agree, with reservations. 14 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3724, at 643—46 (1976). Some cases allow removal, others do not.[3]

Until recently, the Fifth Circuit had considered closely-related issues, but had not definitively ruled on point.[4] Within the last week, however, the court ruled in *Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury*, 622 F.2d 133 (5th Cir. 1980). In the *Heck* case, plaintiff contracted with defendant to provide engineering services on a road construction project. The contract provided for liquidated damages in the event of delay in project completion. When the original general contractor abandoned the project, the bonding company for the project, Maryland Casualty Company, arranged for a new contractor; and Lafourche and Maryland agreed in a relet contract to amend and supplement the original construction contract. The contract was completed, but on the new timetable provided for in the takeover agreement.

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3. *Compare, e.g., Ted Lokey Real Estate Co. v. Gentry*, 336 F.Supp. 741 (N.D.Tex.1972); *Coleman v. A & D Machinery Co.*, 298 F.Supp. 234 (E.D.Cal.1969) *and Wayrynen Funeral Home, Inc. v. J. G. Link & Co.*, 279 F.Supp. 803 (D.Mont.1968) *with Lowe's of Montgomery, Inc. v. Smith*, 432 F.Supp.1008 (M.D.Ala.1977); *Holloway v. Gamble-Skogmo, Inc.*, 274 F.Supp. 321 (N.D.Ill.1967); *Burlingham, Underwood, Barron, Wright & White v. Luchenbach Steamship Co.*, 208 F.Supp. 544 (S.D.N.Y.1962) *and Sequoyah Feed & Supply Co. v. Robinson*, 101 F.Supp. 680 (W.D.Ark.1951).

4. Two cases in the court of appeals skirted the issue. In *Central of Georgia Railway Co. v. Riegel Textile Corp.*, 426 F.2d 935 (5th Cir. 1970), the court considered the removability of a third party claim that had already been severed by a state court. Plaintiff, an individual, brought an FELA claim against the railroad, his employer, in an Alabama state court. The railroad filed a third party complaint against Riegel Textile claiming indemnity under the terms of a track agreement. Riegel removed the case to federal court alleging diversity

Heck thereupon filed suit in a Louisiana state court to recover the liquidated damages provided for in its separate contract with Lafourche. Lafourche filed a third party claim against Maryland contending that Maryland was required to defend Lafourche and hold it harmless from Heck's claim based on a clause in the relet contract. Maryland removed the case to federal court on

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Foot Note Cont'd
in the third party suit. The district court remanded on the ground that the third party complaint was not a separate and independent claim as required by section 1441(c). That ruling was unreviewable at the time. 28 U.S.C. § 1447(d) (1976).

After the remand, the state court on plaintiff's motion severed the two actions for trial. Riegel again removed to federal court. The district court again remanded the FELA claim but it retained the third party claim for indemnity. The Fifth Circuit affirmed. The court of appeals specifically noted the division in the cases on the removability of joined third party claims, but declined to reach the issue. 426 F.2d at 937 & n.6. Rather, noting that the state court had severed the two actions, it held that the third party defendant was now as much a "defendant" as if the third party plaintiff had brought its suit as an original independent action. It thus allowed removal under the terms of 28 U.S.C. Section 1441(a).

In the second of the cases, *Gamble v. Central of Georgia Railway Co.*, 486 F.2d 781 (5th Cir. 1973), the Fifth Circuit again faced an FELA case, but in a different context. Plaintiff, an individual brought an FELA case in state court in Alabama. The railroad brought a third party complaint against the McGregor Printing Company on the basis of a "close clearance" agreement. McGregor removed on the ground of diversity of citizenship in the third party suit. The district court after a lengthy discussion of the issue held that a third party defendant had a right to remove under section 1441(c), denied the motion to remand the third party claim, and in its discretion, *see* 28 U.S.C. § 1441(c) (1976), denied the motion to remand the FELA claim.

The Fifth Circuit reversed but again it did not reach the section 1441(c) problem. Treating only the main demand, the court of appeals ruled that 28 U.S.C. section 1445(a), which prohibits removal of FELA cases, takes precedence over the general removal statute. The court concluded, "The court below was without jurisdiction to hear [the FELA] case, and should have granted the motion for remand of the entire action or alternatively should have severed the FELA suit and remanded it", 486 F.2d at 785.

the basis of diversity of citizenship in the third party demand.

Once in federal court, Maryland moved to sever the third party action from the primary suit and to remand the main action to state court. Lafourche moved to remand the entire case to state court. The district court granted Maryland's motions. It held that third party defendants have a right to remove under section 1441(c) and that the particular case was properly removed because the third party claim was "separate and independent" within the meaning of the statute. In its discretion it remanded the original claim.

The Fifth Circuit affirmed. The court held that third party defendants may remove when the third party complaint states a separate and independent controversy from the main cause of action. The court ruled,

> Here, the claim for indemnity by Lafourche against Maryland presents a real controversy, not unrelated to the main claim, but sufficiently independent of it that a judgment in an action between those two parties alone can be properly rendered. Such actions can be and often are brought in a separate suit from that filed by the original plaintiff in the main claim. If filed in the original suit, therefore, a claim essentially seeking indemnity should be considered separate and independent. *See Bond v. Doig*, 433 F.Supp. 243, 249 (D.N.J.1977); *Wayrynen Funeral Home, Inc., supra*, 279 F.Supp. at 806; *Rafferty v. Frock*, 135 F.Supp. 292, 293 (D.Md.1955).

At 136.

After *Heck*, it is clear that in this circuit third party defendants have the right to remove separate and independent claims. Because the Bank's third party demand is for indemnity, *Heck* also seems to confirm that it is, in fact, a separate and independent claim. Some courts have found certain third party claims for indemnity are not separate and independent, however. E. g., *Croy v. Buckeye International, Inc.*, 483 F.Supp. 402 (D.Md.1979); *Coleman v. A & D Machinery Co.*, 298 F.Supp. 234 (E.D.Cal.1969); *Holloway v. Gamble-Skogmo, Inc.*, 274 F.Supp. 321 (N.D.Ill.1967).

The *Holloway* plaintiffs sued Gamble-Skogmo, Inc. for personal injuries allegedly caused by a defective automobile tire sold by the company to one of the plaintiffs. Gamble-Skogmo brought a third party complaint against Uniroyal alleging negligence in the manufacture of the tire and seeking indemnity. The court held that the third party complaint was dependent on the main action, not separate and independent.

In the *Croy* case, plaintiffs, an infant and his mother, sued Peterson Baby Products alleging injury to the child from a fire in his playpen. Defendant brought a third party complaint against several manufacturing companies, including House of Foam, Inc. Subsequently, House of Foam named Firestone Tire & Rubber Co., trading as Corry Foam Products Co., as a fourth party defendant. The court held that House of Foam's claim against Firestone was not separate and independent, "but rather one for indemnification and/or contribution. [citing *Holloway*]." 483 F.Supp. at 404.

The plaintiff in *Coleman* sued A & D Machinery for breach of warranty in the sale of a construction machine. A & D third partied Garwood Industries, from whom it

had purchased the machine, for indemnity. The court reasoned:

> In the sense that each action arises out of a separate sales transaction and is based on a separate contract of sale, the actions are "separate and independent." But in the sense that both actions resulted from the same defect to the same machine, they are not independent. Which is the correct characterization? Again the authorities are split. Some cases have flatly held that indemnity actions are not independent, while others have characterized claims that essentially sought indemnity as separate and independent. The only Supreme Court case to examine the meaning of "separate and independent" under this statute did not involve a third party defendant. The defendant who had removed was one of several defendants in the original action. The Court concluded:
>
> > * * * that where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c). [*American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 71 S.Ct. 534, 540, 95 L.Ed. 702 (1951).]
>
> That language convinces me that the proper focus should be the injury which occurred and not the transactions which created legal liability. Applying that test to the instant case, the same defect in the same machine gave rise to the liability of both original defendant and cross-defendant, and the claims against each

> are therefore not separate and independent under the statute.

298 F.Supp. at 237 (footnotes omitted).

In contrast to the above cases are the cases cited by the Fifth Circuit in *Heck*. In *Rafferty v. Frock*, 135 F.Supp. 292 (D.Md.1955), the court held that a third party action for indemnity by the owner of a car against his insurance company based on an automobile liability policy was separate and independent from the tort action brought by the injured plaintiff against the insured owner. The main action, the court reasoned, involved questions of negligence, while the third party suit turned on the interpretation of a contract. The third party claim held separate and independent in *Bond v. Doig*, 433 F.Supp. 243 (D.N.J.1977), similarly, was by a yacht owner against his insurance company for denial of coverage and refusal to defend the main action. The original suit was brought by plaintiffs for injuries sustained when the yacht capsized during their tour of a lake. The original cause of action in *Wayrynen Funeral Home, Inc. v. J. G. Link & Co.*, 279 F.Supp. 803 (D.Mont.1968) alleged negligence in design and construction of a mortuary building and breach of warranty of fitness for its intended purpose. But, again, the third party complaint by some of the defendants against Continental Casualty Company sought a declaratory judgment because the insurance company had denied liability under its policy and refused to defend. The court held that the third party claim was distinct from the original claim. In each of the three cases, the respective courts held that diversity in the indemnity claim made the entire case removable under section 1441(c).

Although unarticulated, the line in the indemnity

cases seems fairly well-defined. The third party claims in *Holloway, Croy,* and *Coleman* each sought indemnity on a theory of "active/passive negligence". The defendants who were vicariously liable in law to the plaintiffs sued the parties who they alleged were the actively negligent tortfeasors. *Accord, Manternach v. Jones County Farm Service Co.,* 156 F.Supp. 574 (N.D.Iowa 1957); *Marshall v. Navco, Inc.,* 152 F.Supp. 50 (S.D.Tex.1957); *see Rager v. Crampes,* 223 F.Supp. 346 (W.D.Ky.1963). In each of the cases, as in *Coleman,* there was but a single wrong to plaintiff for which relief was sought. *See American Fire & Casualty Co. v. Finn,* 341 U.S. 6, 14, 71 S.Ct. 534, 540, 95 L.Ed. 702 (1951).

The third party defendants in *Rafferty, Bond,* and *Wayrynen Funeral Home,* on the other hand, had nothing to do with causing the respective plaintiffs' injuries. The third party claims for indemnity in those cases were brought by the alleged tortfeasors against their insurance companies based on insurance policies that involved only the third parties *inter se.* Like the claim based on the relet contract in the *Heck* case, the insurance policy claims, although not unrelated to the main claims, were sufficiently independent of them that a judgment in an action between the tortfeasor and the insurance company alone could be properly rendered. *See Heck,* at 135. Other cases involving separate agreements between the tortfeasor and an independent party reached the same result. *E. g., Hartford Accident & Indemnity Co. v. Shaw,* 273 F.2d 133, 135 n.2 (8th Cir. 1959) (insurance policy); *Gamble v. Central of Georgia Railway Co.,* 356 F.Supp. 324 (M.D.Ala.) *rev'd on other grounds,* 486 F.2d 781 (5th Cir. 1973) ("close clearance" agreement); *McMahon v. City of Troy,* 122 F.Supp. 555 (N.D.N.Y.1954) (indemnity agreement); *see Central of Georgia Railway Co. v. Riegel Textile Corp.,* 426 F.2d

935 (5th Cir. 1970) (track agreement). *Contra, Harper v. Sonnabend,* 182 F.Supp. 594 (S.D.N.Y.1960) (broker's agreement).

Marsh's original claim in the instant case was to cancel allegedly fraudulent mortgages. The Bank's third party claim seeking indemnity against the underwriters is on the basis of a separate policy of insurance with them. I already implicitly recognized the severability of the two claims when I certified the primary controversy for final judgment under Rule 54(b). Minute entry, filed June 26, 1980. The authorities confirm my view that the Bank's cause of action is separate and independent within the meaning of section 1441(c), and the entire case was properly removed to federal court. 28 U.S.C. § 1441(c) (1976); *Heck,* 622 F.2d 133 (5th Cir. 1980).

3. Should I vacate the judgment and remand the main action?

In virtually every case that a court has held that section 1441(c) was properly invoked to remove a case on the basis of a third party claim, the court has nevertheless exercised its discretion to remand the main action to state court.[5] *E. g., Heck,* 622 F.2d 133, at 134. *Ted Lokey Real Estate Co. v. Gentry,* 336 F.Supp. 741, 743 (N.D.Tex.1972). *Contra Gamble v. Central of Georgia Railway Co.,* 356 F.Supp. 324 (M.D.Ala.), *rev'd,* 486 F.2d 781 (5th Cir. 1973) (held on appeal: no discretion; FELA claim non-removable; claim must be remanded alone or with entire case). The Fifth Circuit in *Heck* specifically approved this practice so that removal would not defeat the plaintiff's choice of forum. At 135.

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5. Section 1441(c) provides in pertinent part, "the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction." 28 U.S.C. § 1441(c) (1976).

I find no indication in the cases, however, that any of them had progressed quite so far as this case. On the contrary, the cases seem to indicate that generally a motion to remand closely follows removal. *E. g., id.* at 134. The parties here were content instead to submit to my jurisdiction and fully argue and brief plaintiff's motion for summary judgment that proved to be dispositive. I spent an inordinate amount of time considering that motion, and it would be an unseemly waste of judicial resources to declare the result void and force a state court to go through the same ordeal.

Moreover, it is not plaintiff who complains that its choice of forum was frustrated by third party defendants' removal.[6] It is the defendant Bank, after losing on the merits, that endeavors to wipe the slate clean and start all over again. The result will only be needless delay, because the statute does give me the discretion not to remand the main action and to "determine all issues therein," which I have already done. If the Bank had asked for remand in the first instance, I undoubtedly would have granted the motion. At this late hour, I believe this is the rare case in which my discretion is more properly exercised to keep the main action.

The motion by Pontchartrain State Bank to alter, amend, or set aside is, therefore, denied.

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6. The commentators and the cases make much of preserving the plaintiff's "choice" of forum by denying removal entirely or remanding the main action. *See* 1A Moore's Federal Practice ¶ 0.167[10], at 415 & n.13 (2d ed. 1979); 14 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3724 at 645—46 (1976); *Heck*, 622 F.2d 133, at 135. In many cases, however, the plaintiff has no choice of forum because it is a resident of the same state as its adversary and no other basis of federal jurisdiction exists. *E. g., Wayrynen Funeral Home, Inc. v. J. G. Link & Co.*, 279 F.Supp. 803 (D.Mont.1968). It may well be, as appears in this case, that some plaintiffs prefer a federal forum even though not initially entitled to

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 80-3608

D. C. Docket No. CA-79-2020 "E"

MARSH INVESTMENT CORPORATION,
Plaintiff-Appellee

versus

JOHN A. LANGFORD
Defendant
PONTCHARTRAIN STATE BANK
Defendant-Appellant
WILLIAM M. JUSTICE, Clerk of Court, Etc., ET AL.
Defendants-Appellees

Appeal from the United States District Court for the
EASTERN DISTRICT OF LOUISIANA

Before
CHARLES CLARK, TATE and SAM D. JOHNSON,
Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

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it, and once there will not protest. *But see id.* at 804. If there is any evidence of collusion, though, the court might take a harder look at the propriety of removal. *See Heck*, 622 F.2d 133, at 134 n.1 (E.D.La. 1978), *aff'd*, 622 F.2d 133 (5th Cir. 1980).

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee and defendants-appellees, the costs on appeal to be taxed by the Clerk of this court.

AUGUST 6, 1981

Issued as Mandate: September 8, 1981

28 U.S.C. § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon

alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

Opposition

Office - Supreme Court, U.S.
FILED
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CLERK

NO. 81-848

In the Supreme Court of the United States

OCTOBER TERM, 1981

PONTCHARTRAIN STATE BANK,
Petitioner

versus

MARSH INVESTMENT CORPORATION, ET AL.
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION OF RESPONDENT MARSH INVESTMENT CORPORATION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit correctly held that there is no absolute bar to removal of third party claims under 28 U.S.C. §1441.

2. Whether the Fifth Circuit properly affirmed the District Court's holding that, based upon the facts of the case at bar, the Bank's third-party claim for indemnity under the terms of a disputed insurance contract was "separate and independent" from the plaintiff Marsh's claim for the cancellation of unauthorized mortgages and was therefore properly removable under 28 U.S.C. §1441(c).

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28 U.S.C. §1441(c) . . . . . **i, 3, 4, 5, 6, 7, 8, 10**

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

PONTCHARTRAIN STATE BANK,
Petitioner

versus

MARSH INVESTMENT CORPORATION, ET AL.
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION OF RESPONDENT MARSH INVESTMENT CORPORATION TO PETITION FOR CERTIORARI

MAY IT PLEASE THE COURT:

Respondent Marsh Investment Corporation respectfully suggests that, for the reasons set out below, the instant cause should not be reviewed by this Court.

STATEMENT OF THE CASE

Pursuant to Rule 34 of this Court, Respondent's statement of the case will be limited to that which it

deems necessary to correct omissions in Petitioner's statement of the case.

The claim asserted by plaintiff Marsh Investment Corporation[1] (hereafter "Marsh") against defendant Pontchartrain State Bank (hereafter "Pontchartrain" or the "Bank") was for injunctive relief to cancel certain mortgages on Marsh's property that had been placed thereon by defendant John A. Langford to secure his debt to the Bank. Langford had posed as Marsh's agent, but had no authority to act for Marsh. No Resolution of the Board of Directors had been adopted authorizing Langford to act for Marsh, nor had the shareholders of Marsh given any kind of written consent to his action.

Louisiana law provides that an agent cannot mortgage the property of a principal without specific, written authorization. Further, a Louisiana corporation is bound only if its Board of Directors or all of its shareholders have taken action constituting such an authorization to mortgage. These provisions of law formed the substantive basis of Marsh's claim.

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1. Marsh Investment Corporation has no parent companies, subsidiaries, or affiliates.

Almost a year after Marsh filed suit in state court, the Bank brought a third-party action against its underwriters. This claim sought indemnity under the bankers blanket bond issued in favor of the Bank by the underwriters. The underwriters had refused coverage under this insurance contract, the relevant provision of which provided for indemnity in the event of

> Loss . . . through the insured's having in good faith and in the course of business, whether for its own account or for the account of others, . . . either gratuitously or otherwise acquired, accepted or received, or sold or delivered, or given any value, extended any credit or assumed any liability, on the faith of, or otherwise acted upon, any securities, documents or other written instruments which prove to have been counterfeited or forged. . . .

The underwriters removed the entire lawsuit, including plaintiff's claim for cancellation of the mortgages, to the District Court pursuant to 28 U.S.C. §1441(c). Defendant Pontchartrain did not object to the removal in any respect until thirteen months later, eight days after the entry of final judgment in favor of plaintiff on its motion for summary judgment, ordering the mortgages cancelled.

SUMMARY OF THE ARGUMENT

The Fifth Circuit was correct in holding that if a claim is in fact "separate and independent" within the meaning of 28 U.S.C. §1441(c), it may be removed to the federal district court without regard to whether it happens to be a third-party claim. The non-resident called to defend that third-party claim in state court is equally in need of an impartial federal forum as the non-resident called to defend a claim brought by the original plaintiff, and this Court has recognized that the right to such a federal forum is an important jurisdictional right.

The Fifth Circuit was also correct in affirming the District Court's conclusion that, on the facts at bar, the Bank's claim for indemnity from its underwriters under the terms of a disputed insurance contract between them was "separate and independent" from the plaintiff Marsh's claim against the Bank for cancellation of unauthorized mortgages on its property. These two claims alleged entirely different injuries, claimed violations of entirely different sets of legal rights, and sought entirely different relief.

Neither this Court nor any other federal court of appeals has ruled on the precise problem presented to the Fifth Circuit below, but that court's resolution of

this problem is in harmony with both the principles underlying the removal statute and the prior decisions of another Circuit Court and of this Court.

ARGUMENT

In the instant case, the Fifth Circuit held, *per curiam*, that the District Court had properly concluded that the claim by the Bank against its underwriters was "separate and independent" from the claim by Marsh against the Bank, and was therefore removable under 28 U.S.C. §1441(c) without regard to whether it was a third-party claim or one of several claims joined against multiple defendants. The decision by the Fifth Circuit below does not call for review by this Court on any of the issues presented. It was an entirely correct application of the language of 28 U.S.C. §1441 to the facts of the case and was consistent with prior decisions of this Court and another Circuit Court.

I.

There is no absolute bar to removal of third party claims under 28 U.S.C. of §1441.

In the instant case, the Fifth Circuit followed by its recent decision in *Carl Heck Engineers, Inc. v.*

Lafourche Parish Police Jury, 622 F.2d 133 (5th Cir. 1980) (hereafter "*Heck*"), in which it had quite reasonably concluded that if a claim is "separate and independent" within the meaning of 28 U.S.C. §1441(c), the fact that it happens to be a third party claim should not prevent its removal. The purpose of removal in diversity cases is to afford an impartial federal forum to a non-resident defendant called to defend a claim in state court. *Central of Georgia Ry. Co. v. Riegel Textile Corp.*, 426 F.2d 935, 938 (5th Cir. 1970). This Court has emphasized that the availability of such a forum through removal is a jurisdictional right, equal in importance to the right to a federal forum through original jurisdiction. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 344-45, 96 S.Ct. 584, 590 (1976); *cf. Meredith v. City of Winter Haven* 320 U.S. 228, 234-35, 64 S.Ct. 7, 11 (1943). The availability of this right should not depend upon whether the non-resident is defending a third-party action rather than part of the plaintiff's main demand. That would make this important federal right of removal depend entirely on the idiosyncracies of state practice and the chance of who sues first in state court. *Heck, supra*, 622 F.2d at 135-36.[2]

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2. Several District Courts have articulately stated this principle. *Wayrynen Funeral Home, Inc. v. J.G. Link & Co.*, 279 F. Supp. 803, 806 (D. Mont. 1968); *Bond v. Doig*, 433 F. Supp. 243, 247-48 (D.N.J. 1977) ("removability . . . cannot rationally be made to depend on the accident of

The plaintiff's right to have his non-federal claims remain in state court is fully protected by the provision of §1441(c) authorizing remand of the otherwise non-removable claims. In the instant case, of course, the original plaintiff has never objected to the change to a federal forum.[3]

The Fifth Circuit's decision that third-party claims are not automatically barred from removal was thus firmly grounded in the principles underlying §1441, as enunciated by this Court. No other federal court of appeals has ruled on this question.

Nor is this decision by the Fifth Circuit in conflict, even in principle, with any prior decision of this Court. *American Fire & Casualty Co. v. Finn*, 341 U. S. 6, 71 S.Ct. 534 (1951), dealt solely with the meaning of the "separate and independent" standard and, as

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who sues first, or on the niceties of state pleading and practice. . . . The rational test is not how the claim comes up in the state court suit, but its nature.").

3. The District Court exercised its discretion not to remand plaintiff's claim both because of plaintiff's acceptance of the federal forum and because of the substantial amount of judicial resources that had been spent considering and deciding the case before defendant Pontchartrain called the removal into question. The Fifth Circuit's affirmance of this particular aspect of the case is not challenged in this Court.

discussed below, the Fifth Circuit applied that standard in conformity with *Finn* as well as another Circuit Court decision construing §1441(c). In *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 61 S.Ct. 868 (1941), the party attempting to remove was actually the original plaintiff who had brought suit in state court, which party this Court ultimately held not to constitute a "defendant" permitted to remove a claim under §1441. By contrast, in the instant case, as the Fifth Circuit recognized, the party seeking removal was brought into the case only to defend a claim against it, and the Fifth Circuit held it to be irrelevant under §1441 whether that claim happened to be a third party claim.

II.

The Fifth Circuit properly affirmed the District Court's holding that, in this particular case, the Bank's claim against its underwriters for indemnity under an insurance contract was "separate and independent" from the plaintiff's claim against the Bank for cancellation of unauthorized mortgages, within the meaning of 28 U.S.C. §1441(c).

When the District Court below was presented with the question of the removal, it was intimately familiar with the facts of the case. It had already

decided in favor of plaintiff on a motion for summary judgment after extensive briefing and submission of documents from the parties. The District Court considered Pontchartrain's third-party claim against its underwriters for indemnity that the underwriters had refused to provide under the terms of the bankers blanket bond to be "separate and independent" from plaintiff Marsh's claim for an injunction ordering the cancellation of the mortgages it had not authorized.

The Fifth Circuit affirmed, citing its recent decision in *Heck*. The Fifth Circuit obviously felt that the Bank's claim met the criteria it had established in *Heck* for determining a separate and independent claim:

> . . . a real controversy not unrelated to the main claim, but sufficiently independent of it that a judgment in an action between those two parties alone can properly be rendered. Such actions can be and often are brought in a separate suit . . .

622 F.2d at 136.

The Fifth Circuit's decision on this point represents another component of the case law concerning the "separate and independent" standard that has been developing steadily since the enactment

or §1441(c) in 1948 and especially since this Court's decision in *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 71 S.Ct. 534 (1951). The application of this standard in *Heck* and the instant case was entirely consistent with *Finn*, in which "separate and independent" claims were found not to exist where all of the claims at issue sought monetary compensation for the same injury, namely the loss by fire of plaintiff's property. In the instant case, by contrast, plaintiff's claim sought relief for an entirely different injury and claimed the violation of an entirely different legal right than the Bank's claim against its underwriters. Plaintiff sought cancellation of mortgages on its property established without the authorization required under state law; the Bank sought indemnity under the terms of a disputed contract of insurance between it and its underwriters.

The Fifth Circuit's application of §1441(c) in the instant case and in *Heck* is also in harmony with that of the First Circuit in *Hartford Accident and Indemnity Co. v. Shaw*, 273 F.2d 133, 135 n.2 (8th Cir. 1959), in which a claim against an insurer similar to that of the Bank against its underwriters was considered to be "separate and independent" from other claims arising among the actual parties to an accident or occurrence, like plaintiff Marsh's claim against Pontchartrain. *Accord Thornton v. Allstate Insurance Co.*, 492 F.Supp.

645, 647 (E.D. Mich. 1980); *National Savings & Loan Association v. St. Paul Fire and Marine Insurance Co.*, 84 F.R.D. 424, 427-28 (E.D. Wisc. 1979); *Bond v. Doig*, 433 F. Supp. 243, 248 (D.N.J. 1977). Rather than evidencing uncertainly needing the guidance of this Court, this particular area of the law concerning §1441(c) appears to be developing correctly and consistently.

CONCLUSION

For the foregoing reasons, the Bank's Petition for Writ of Certiorari should be denied. The decision of the Fifth Circuit below was well-reasoned and soundly based upon the applicable statute and the relevant case law.

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____, 1981, three copies of this Opposition to Petition for Certiorari were mailed, postage prepaid, to Robert C. Lowe, Esq., 2500 Pan American Life Center, New Orleans, Louisiana 70130, Counsel for Petitioner; Marian Mayer Berkett, Esq. and Matt J. Farley, Esq., 4700 One Shell Square, New Orleans, Louisiana 70130, Counsel for Respondent, Crump London Underwriters, Inc., et als; Don M. Richard, Esq., 2100 Pan American Life Center, 601 Poydras Street, New Orleans, Louisiana 70130, Counsel for Respondent, Eunice K. Langford; Langford Land Company, 3870 Metairie Court, Metairie, Louisiana; Hon. William M. Justice, Ex-Officio Recorder of Mortgages, Parish of Jefferson, New Courthouse, Gretna, Louisiana 70053; and Hon. Charles J. Oubre, Ex-Officio Recorder of Mortgages, Parish of St. Charles, Hahnville, Louisiana 70057.

I further certify that all parties required to be

served have been served.

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